Supreme Court, U. S.
FILED
OCT 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-695

DARRELL WAYNE FOWLER, *Petitioner*

v.

THE STATE OF IOWA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

JAMES M. HOOD
PEART & HOOD
315 Union Arcade Bldg.
Davenport, Iowa 52801
Telephone: (319) 322-0978
Counsel for Petitioner

Dated: October 16, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Pages
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING WRIT	3
LEGAL POINTS AND AUTHORITIES	3
CONCLUSION	4
APPENDIX A—Motion to Suppress in the Iowa District Court, Filed February 22, 1977	1a
APPENDIX B—Ruling on Motion to Suppress in the Iowa District Court, Filed March 16, 1977	4a
APPENDIX C—Decision of the Iowa Supreme Court Filed July 26, 1978	8a

CITATIONS

CASES:

Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)	3
Lego v. *Twoney*, 92 S.Ct. 692, 404 U.S. 477, 30 L.Ed. 2d 618 (1972)	3
Brady v. *U.S.*, 90 S.Ct. 1463, 397 U.S. 742, 25 L.Ed. 2d 747 (1970)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

DARRELL WAYNE FOWLER, *Petitioner*

v.

THE STATE OF IOWA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays for writ of certiorari to issue to review the opinion and judgment of the Supreme Court of Iowa entered in this proceeding on July 26, 1978.

OPINIONS BELOW

The Ruling on Motion to Suppress of the Iowa District Court appears at Appendix 1a.

The opinion of the Supreme Court of Iowa entered on the 26th day of July, 1978, appears at Appendix 8a.

JURISDICTION

The opinion of the Supreme Court of Iowa was entered on July 26, 1978. This Petition for Certiorari was filed less than 90 days after the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

May the State use an inculpatory statement as substansive prosecutory evidence after the restriction of a persons liberty.

CONSTITUTIONAL PROVISION

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or a grand jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

The following is a brief review of the relevant facts: Davenport Police Officers Lambdin and Graves observed Petitioner kneeling over the body of his deceased wife, whom it was alleged he shot in the intersection of a street in Davenport, Iowa.

The Officers got out of their police car and approached the Petitioner with their guns drawn.

When the Officers were within three or four feet of Petitioner who was kneeling over his wife in the middle of the street, the Officers told Petitioner to move back from the body.

Petitioner moved away from the body and made the statement "I got mad and shot her".

The Officer placed Petitioner under arrest and subsequently gave him his miranda warnings.

REASON FOR GRANTING WRIT

The Court below clearly misapplied past decisions of this court.

LEGAL POINTS AND AUTHORITIES

A citizen's fifth amendment privilege against self incrimination come into play as soon as law enforcement officers restrict the citizen's freedom of action in any significant way. All inculpatory statements obtained after the restriction of a citizen's liberty by police officials are inadmissible as substantive prosecutory evidence. See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966); *Lego* v. *Twoney*, 92 S.Ct. 692, 404 U.S. 477, 30 L.Ed. 2d 618 (1972); and *Brady* v. *U.S.*, 90 S.Ct. 1463, 397 U.S. 742, 25 L.Ed. 2d 747 (1970).

The trial court clearly disregarded the principle enunciated in the above cases that a citizen whose liberty has been placed under restraint by law enforcement officials shall not be compelled to be a witness against himself in violation of the fifth amendment of the United States Constitution. The trial court clearly errored in overruling Defendant's Motion to Suppress the statement "I got mad and shot her", and in allowing the jury to hear the statement "I got mad and shot her" over the objections of Defendant.

CONCLUSION

Because the trial court clearly misapplied past decisions of this court, the Petitioner respectfully requests this court to grant this Petition for Writ of Certiorari to the Supreme Court of Iowa.

Respectfully submitted,

JAMES M. HOOD
PEART & HOOD
315 Union Arcade Bldg.
Davenport, Iowa 52801
Telephone: (319) 322-0978
Counsel for Petitioner

Dated: October 16, 1978

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

STATE OF IOWA, *Plaintiff*

vs.

DARRELL WAYNE FOWLER, *Defendant.*

No. 17555

Motion to Suppress

Filed February 22, 1977

DIVISION I

Comes now the Defendant, Darrell Wayne Fowler, by his attorneys, Peart and Hood, and moves to suppress certain statements made by Defendant to Officers Jerry Lambdin of the Davenport Police Department, and Davenport Police Officer William Howard Graves on the 17th day of November, 1974, and in support of said Motion, states as follows:

1. By prior testimony in this Court, Officers Lambdin and Graves have testified that on the 17th day of November, 1974, they observed Defendant kneeling over the body of his deceased wife in the vicinity of the intersection of 67th Street and Main Street in the City of Davenport, Iowa; that the officers got out of their police car and approached the Defendant with their guns drawn; that when the officers were within three or four feet, Defendant was kneeling over his wife in the middle of the street, and Officers Lambdin and Graves told Defendant to "move back from the body"; that Mr. Fowler moved away from the body and made the statement "I got mad and shot her"; and that the officers placed Mr. Fowler under arrest and subsequently gave him his Miranda warning.

2. A suspect's 5th Amendment privilege against self incrimination and his 6th Amendment right to assistance of counsel to protect that privilege come into play as soon as law enforcement officers restrict his freedom of action in any significant way.

3. The alleged statement made by Defendant to the officers occurred after his freedom of action had been restrained, but before he was advised of his (Miranda) rights.

4. *Miranda* v. *Arizona,* 384 U.S. 436 holds that all inculpatory statements obtained after the restriction of a person's liberty are inadmissible as substantive prosecutory evidence.

5. The State has the burden to prove that statements were voluntary. *State* v. *Snethen,* 245 N.W. 2d 308 (Iowa 1976). In order to establish the voluntariness of defendant's inculpatory statements, the State must demonstrate from the totality of the circumstances that the statements were the products of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne, nor his capacity for self-determination critically impaired. *State* v. *Cullison,* 227 N.W.2d 121, 127 (Iowa 1975).

WHEREFORE, the Defendant moves the Court to suppress the alleged statement, "I got mad and shot her" made by Defendant to Officers Lambdin and Graves, and further that the Court set a time and place for hearing on this Motion to present evidence of Officers Lambin and Graves that the aforesaid statement was voluntarily made.

DIVISION II

Comes now the Defendant, Darrell Wayne Fowler, by his attorneys, Peart and Hood, and moves to suppress a 9 millemeter Astra handgun, Serial No. 16813, and the bullet clip to said gun, and in support of said Motion, states as follows:

1. That in previous testimony before this Court, Officer Jerry Lambdin has testified that he removed a 9 millemeter Astra handgun, Serial No. 16813, and the bullet clip from the passenger side of a 1966 Chrysler vehicle and that he did not have a search warrant when he removed the handgun and clip from the vehicle.

2. That on the 17th day of November, 1974, Darrell Wayne Fowler had been driving the vehicle from which the gun and clip were removed and prior to the removal of the gun and clip had the gun and clip in his possession.

3. That the gun and clip were removed from the vehicle without the consent of Mr. Fowler.

4. Warrantless searches are per se unreasonable under the 4th Amendment to the United States Constitution, subject only to a few specifically established and well-delineated exceptions. The burden is on those seeking to come within the exception to show the exigencies of the situation making such search imperative.

WHEREFORE, the Defendant, Darrell Wayne Fowler, moves the Court to suppress from evidence the 9 millemeter Astra handgun, Serial No. 16813, and the bullet clip, and further moves the Court to set this matter down for hearing at a time and place.

PEART & HOOD
Attorneys for Defendant

/s/ By JAMES M. HOOD
James M. Hood
319-322-0978
315 Union Arcade
Davenport, Iowa 52801

APPENDIX B

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR SCOTT COUNTY

STATE OF IOWA, *Plaintiff*,

v.

DARRELL WAYNE FOWLER, *Defendant*.

No. 17555

Ruling on Motion to Suppress

Filed March 16, 1977

Hearing was held March 8, 1977 on defendant's Motion to Suppress. The defendant was present with his attorney, James M. Hood, and the State of Iowa was represented by Gary M. Lane, Assistant County Attorney.

The State had the burden of showing by a preponderance of the evidence that the statement of the defendant that "I got mad and shot her", was voluntary.

The State called Officer Jerry Lambdin, and the defense called William Graves. The former was and still is a police officer of the City of Davenport, Iowa, and the latter was, on the 17th day of November, 1974, a police officer of the City of Davenport.

The record would show that some time after 10:30 p.m. the officers received a radio call of shots being fired in or around the intersection of 67th and Main Streets in the City of Davenport, Iowa. They proceeded to that location where they saw two people in the street, a woman down and a man bending over her. They approached the subjects, Lambdin with his gun drawn and Graves with a shotgun. As they approached they told the male, who was the defendant, to back away from the body. Defendant did, and said, "I got mad and shot her." Officer Lambdin had his

service revolver drawn as he approached, but not pointing at defendant. Officer Graves had his shotgun pointing in the direction of defendant.

After the occurrence Office Lambdin went to the defendant's car and saw a gun on the floorboard of the car on a pile of clothes. It was in plain view, and the officer took the weapon and noted that the breech was open and the clip not in the weapon. He lifted the clothing upon which the weapon was resting and found the clip. Both were removed and retained by the police.

CONCLUSIONS OF LAW

Res gestae refers to a statement made immediately before, during or immediately after the commission of a crime by the accused, the victim or a bystander, as a spontaneous reaction or utterance stimulated by the excitement of the occasion, and made under such circumstances as to preclude contrivance or fabrication. *13th Ed. Wharton's Criminal Evidence*, Vol. 2, Sec. 297.

A spontaneous utterance which qualifies under the res gestae rule is admissible without regard to whether its author is the defendant, the victim or a bystander, and such utterance is admissible without regard to whether it inculpates or exculpates the defendant.

A declaration will constitute a "spontaneous utterance" within the meaning of the res gestae rule when such declaration is contemporaneous with the event in question. *13th Ed. Wharton Criminal Evidence*, Vol. 2, Sec. 298.

See also *State* v. *Crawford*, 204 N.W. 2d 99 at Page 101, where the Iowa Supreme Court discussed the admissibility of testimony as part of the rest gestae.

Also, *State* v. *Rank*, 214 N.W. 2d 136, regarding volunteered statements, and Miranda (16 Fed. 2d at Page 726). They quote from Miranda, "Volunteer statements of any

kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today."

Also, *State* v. *Snethen,* 245 N.W. 2d 308, which deals with the question of volnutariness of a defendant's inculpatory statements.

The Iowa law on warrantless searches provides that a peace officer may search an automobile without a warrant when existent circumstances and probable causes exist. *Coolidge* v. *New Hampshire,* 29 Fed. 654. *State* v. *Shea,* 218 N.W. 2d 610.

Police may stop and search a car if the stopping officer had specific and articulate cause to reasonably believe criminal activity is afoot. *State* v. *Dixon,* 241 N.W. 2d 21.

The fact that a search occurs a few minutes before the arrest does not per se invalidate that search. *State* v. *Harvey,* 242 N.W. 2d 330.

Application of Law to Facts

The court would find that from the totality of the circumstances, which would include the approach of the two officers with guns drawn, the statement made by the defendant that "I got mad and shot her" was the product of a free and unconstrained choice by the defendant. That at that time his will was not overborn nor his capacity for self determination critically impaired by the two officers who approached him with their guns drawn and told him to "back away from the body."

Also, that the removal of the 9 millimeter Astra handgun, Serial No. 16813, was legal, since it was in plain view on the floorboard of the defendant's car. The plain view doctrine permits such a seizure.

As to the clip, it was also within the officer's right and duty to search the floor under the clothing, since the breech was open and the clip apparently missing. There was

nothing illegal or violative of the defendant's rights in this search.

It Is, Therefore, Ordered:

1. That the motion to suppress the alleged statement of the defendant, "I got made and shot her" made to Officers Lambdin and Graves is denied, with exception duly noted.

2. That the motion to suppress from evidence the 9 millimeter Astra handgun, Serial No. 16813 and the bullet clip is also denied, with exception duly noted.

The clerk shall deliver copies of this ruling to counsel.

Dated March 16, 1977.

/s/ R. K. Stohr
Judge, Seventh Judicial District
of Iowa

APPENDIX C

IN THE SUPREME COURT OF IOWA

Filed July 26, 1978

166

60879

STATE OF IOWA, *Appellee*

v.

DARRELL WAYNE FOWLER, *Appellant*

Appeal from Scott District Court—R. K. Stohr, Judge

Defendant appeals from convictions of second-degree murder and assault with intent to commit murder.—Affirmed.

James M. Hood, of Davenport, for appellant.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General, and Gary M. Lane, Assistant County Attorney, for appellee.

Considered by Moore, C.J., and Rawlings, LeGrand, Harris, and McCormick, JJ.

HARRIS, J.

Following our reversal upon defendant's prior appeal he was retried and again convicted of second-degree murder and assault with intent to commit murder. From these convictions defendant once more appeals, challenging the jury instructions given by the trial court. We affirm.

The facts are not in serious dispute. They were recited in our opinion upon defendant's prior appeal. State v. Fowler, 248 N.W.2d 511, 513 (Iowa 1976). Darrell Wayne Fowler (defendant) was to return his three youngest children to their mother, defendant's former wife, Patricia, on November 17, 1974. After driving to her residence defendant sat with the children in the car for about five to ten minutes.

Patricia, accompanied by her boyfriend, Richard Kamps, came to the car from the house. Patricia went to the passenger side and Kamps the driver's side. Patricia opened the door and tried to pull one of the children from the car. Kamps and defendant began arguing. There is dispute as to whether or not Kamps came into physical contact with defendant. According to defendant Kamps attempted to pull defendant from the car by grabbing his legs.

At this point Kamps observed that defendant was armed. He shouted, "My God, he's got a gun," and began running. Defendant fired three shots all of which struck Kamps. Defendant then started after Patricia. A neighbor testified defendant stopped under a street light, raised his arm, and fired a shot at Patricia. At trial defendant testified his intention was only to scare Kamps and not to hit him. He testified he chased Patricia in order to discuss his visitation rights. According to defendant when he caught her he put his hand on her shoulder and she fell to the ground. He straddled the lower portion of her body and the gun discharged when he was trying to hold down her arms.

When the police arrived and approached Fowler he said, "I got mad and shot her." Patricia died as a result of the shooting. Kamps survived. Defendant was tried and convicted of second-degree murder for Patricia's death. On a separate count he was tried and convicted of assault with intent to commit murder for the shooting of Kamps.

Defendant's two assignments relate to his requested instructions on involuntary accidental homicide and the trial court's instruction on the provocation necessary to reduce second-degree murder to manslaughter.

I. Defendant's first complaint is directed to instructions given and the refusal of the court to give requested instructions on the subject of involuntary manslaughter. Defendant argues he made out a jury question on his claim the killing of Patricia was an accident. He believes he was improperly deprived by the instructions of an opportunity to have the jury fairly consider whether to acquit him of second-degree murder in favor of the included offense of *involuntary* manslaughter. The jury instructions given were in fact more complete for considering voluntary manslaughter than for involuntary manslaughter.

The distinction between the two types of manslaughter was explained in *State* v. *Boston*, 233 Iowa 1249, 1255, 11 N.W.2d 407, 410 (1943):

"Our statute, Code section 12919 [§ 690.10, The Code, 1973], does not define manslaughter. The common-law definition, the unlawful killing of another without malice express or implied, prevails in Iowa. It is commonly divided into voluntary and involuntary manslaughter. The former is committed in a sudden heat of passion due to adequate provocation. Involuntary manslaughter is an unintentional killing without malice in the doing of an unlawful act not amounting to a felony or of some lawful act in an unlawful manner. (Authorities)."

Our observation in *Boston* can be put in somewhat clearer perspective by contrasting it with the following:

"The trend of the case-law, where not hampered by statute, has been to include within 'voluntary manslaughter' certain unintentional killings,—that is, it includes all homicides whether intentional or unintentional which are committed with a man-endangering-state-of-mind and are not justified or exused but are perpetrated under circumstances of recognized mitigation. And since manslaughter itself is a 'catch-all' concept, including as a matter of common law all homicide not amounting to murder on the one hand and

not legally justifiable or excusable on the other, the general outline of involuntary manslaughter is very simple. Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.

"Part of the boundary line of this 'catch-all' concept having been dealt with in the consideration of malice aforethought and of voluntary manslaughter, it is necessary at this point to take up the factors which determine whether homicide is or is not excusable. Where loss of life has been neither intended nor the result of any other sort of man-endangering-state-of-mind, the killing will be excused if he who caused it was not engaged in any unlawful activity at the time and was free from negligence. Homicide is excusable, so far as the common law of crimes is concerned, in some cases in which the slayer was not as fully free from fault as indicated by such a statement. This requires separate attention to killings resulting from (a) negligence, and (b) an unlawful act." Perkins, *On Criminal Law*, pp. 71-72 (Second Ed. 1969).

We recently reviewed and explained the single standard of conduct to be applied in involuntary manslaughter cases. *State* v. *Kernes*, 262 N.W.2d 602, 604-606 (Iowa 1978).

In defendant's earlier appeal 248 N.W.2d at 518-520 we considered defendant's claim the trial court upon his first trial should have instructed that defendant was entitled to an acquittal if the jury found the shooting of Patricia was an accident. For the reasons there explained we rejected defendant's contention.

Defendant believes our decision in his earlier appeal does not control the instant assignment. In the earlier case we considered whether the fact of an accident should entitle him to an outright acquittal. By contrast the question defendant now seeks to raise is whether the fact (if it be a

fact) the shooting of Patricia was an accident should reduce his guilt from second-degree murder to involuntary manslaughter. We agree our opinion in defendant's earlier appeal is not dispositive of the instant assignment.

The State contends defendant did not preserve error on this assignment because his requested instructions were themselves erroneous. Defendant counters this contention on the basis of our oft cited rule in *State* v. *Wilson*, 234 Iowa 60, 85, 11 N.W.2d 737, 749-750 (1943):

"* * * [E]ven though any of the instructions requested may have contained erroneous statements of law, if they were matters upon which the court should have instructed, but did not, the court committed error in not properly instructing upon them when thus called to its attention. This is the rule in civil cases, and, by stronger reason, it is, and should be, the rule in criminal cases. * * *."

This well settled rule has no application here. The purpose of the *Wilson* rule is to prevent an obvious injustice. The drafting of jury instructions is an exacting craft. A litigant should be allowed, whenever possible, to assert on appeal those errors he made known to the trial court. Under *Wilson* the error pointed out to the trial court by way of a requested instruction is preserved notwithstanding the existence of error in the requested instruction.

Many reasons support the rule. For example in drafting requested instructions trial counsel do not enjoy the advantage of improving them by way of entertaining exceptions. The central basis for the rule rests in addressing the needless injustice that would otherwise result. A technical drafting failure which does not mislead the trial court should not deny a litigant his right to appeal on the basis of the error he complained of. Under this view it becomes most important to understand exactly what was made known to the court in the requested instruction.

Defendant's requested instructions were as follows:

"Instruction #1: You are instructed that it is the position of Darrell Fowler that the shooting of Patricia Fowler was an accident.

"Accidental death, to be excusable, must be caused in the doing of some lawful act.

"You are instructed that if an individual with a gun in his possession is acting with a disposition that shows a heart without regard for human life, and the gun accidentally discharges, he is not doing a lawful act, and is not entitled to an accident defense; but, if the individual with the gun is acting in a negligent manner and the gun accidentally discharges, then your verdict should be manslaughter.

"The State of Iowa has the burden to demonstrate beyond a reasonable doubt that the shooting was not an accident, and was unlawful.

"Instruction #2: Involuntary manslaughter is defined as the unlawful killing of a human being without malice expressed or implied. If the act of killing is done on sudden impulse and is immediately executed without deliberation, premeditation, or malice, the crime is voluntary manslaughter.

"Instruction #3: If you find the shooting was an accident, but are uncertain whether Darrell Fowler was acting with a disposition that shows a heart without regard to human life, or in a negligent manner with a gun, you must give Darrell Fowler the benefit of your doubt, and find him guilty of manslaughter."

Defendant's exceptions to the trial court instructions did nothing to expand the language of his requested instructions. He complained there was "no instruction on accident." In arguing for such an instruction defendant took the position Patricia's killing was not unlawful if accidental. Taken together, defendant's requested instructions and ex-

ceptions to the trial court's instructions were not sufficient to preserve the theory he now seeks to present on appeal.

In order to explain why we think defendant's record was insufficient we must bear in mind the claims made during trial. First, defendant contended, at least in part, his shooting of Patricia was done in the heat of passion and due to adequate provocation by Kamps. See division II of this opinion. The jury was fully instructed on the subject of voluntary manslaughter.

Defendant then turned his argument to involuntary manslaughter. But, under *State* v. *Boston*, supra, there was no involuntary manslaughter unless defendant was either engaged in (1) an unlawful act not amounting to a felony, or (2) a lawful act done in an unlawful manner. The second possibility for involuntary manslaughter is not available to defendant because we rejected any suggestion defendant was engaged in any lawful act under the same facts in his first appeal. 248 N.W.2d at 520.

Accordingly defendant is driven to now claim his shooting of Patricia could have been involuntary manslaughter under the sole remaining definition: He is left with the possibility of claiming he killed Patricia while engaged in an unlawful act not amounting to a felony. The question then becomes whether defendant's trial record in this regard was sufficient to alert the trial court to the position he now wishes to assert on appeal.

Defendant now seeks to complain of the failure of the trial court's instructions to sufficiently inform the jury of the differing characteristics and effects of involuntary manslaughter as contrasted with voluntary manslaughter. At trial, in his requested instructions, and in his exceptions to the trial court's instructions, defendant sought to have the jury informed as to his theory regarding his claim the shooting was an accident. In his requested instructions 1 and 3 the thrust of defendant was one of negligence. In requested instruction 2 defendant did refer to involuntary

manslaughter by name but the definition there offered was in no way inconsistent with the trial court's general definition of manslaughter.

We cannot find the trial court was alerted to any claim the shooting of Patricia occurred while defendant was doing an unlawful act not amounting to a felony, such as an assault or assault and battery.

Defendant's record was insufficient to preserve error. His first assignment is without merit.

II. In his second assignment defendant complains of instructions given and refused on the provocation necessary to reduce second-degree murder to manslaughter. The trial court instructed the jury it was for them to determine whether a blow, if any, administered by Kamps was sufficient provocation to reduce the charge of assault with intent to commit murder to assault with intent to commit manslaughter. Defendant contends a similar instruction should have informed the jury to consider whether provocation of Kamps was sufficient to reduce the charge of second-degree murder of Patricia down to manslaughter.

The question is whether the provocation, to be effective to reduce the charge, must be caused by the slain person. We find no Iowa cases directly dealing with the question. However the rule seems to be "* * * the provocation must have been given by the person who was killed, except in those cases in which the wrong person was killed by accident or mistake, or deceased was present aiding and abetting the person causing the provocation." 40 C.J.S., *Homicide*, § 53, p. 97. See also 40 Am.Jur.2d, *Homicide*, § 59, p.352. We understand the exception for persons killed "by accident of mistake" to be cases of mistaken identity under the above definition. Patricia's death was not the result of mistaken identity.

It is unlikely the case falls under the other exception, where the deceased "was present aiding and abetting the person causing the provocation." Patricia was present at

the time defendant now claims Kamps provoked him. But, even accepting defendant's version of the evidence, we find no claim that Patricia aided or abetted Kamps in any attack on defendant.

In any event we reject defendant's second assignment on the basis of his own testimony. Defendant testified he had no desire or intention of killing Patricia. On cross-examination defendant testified in part as follows:

"LANE (the prosecutor): So generally you said, 'I got mad and then I shot Pat?'

"FOWLER: But it wasn't meant to be I was mad at Pat. For there was no reason for my being mad at Pat.

"LANE: You won't dispute, according to your own statement, at the time you shot Pat you were in a state of anger, weren't you?

"FOWLER: I was not angry to harm anyone. I can definitely tell you this."

It can be seen defendant's own testimony belies any claim any provocation by Kamps influenced his behavior toward Patricia. Defendant was not entitled to the instruction he sought because there was no evidence to support submission of such a theory to the jury. Defendant's contention to the contrary is without merit.

AFFIRMED.